Before the
Federal Communications Commission
Washington, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

WALLER CREEK COMMUNICATIONS, INCORPORATED REPLY COMMENTS IN RESPONSE TO SECOND FURTHER NPRM

NOW COMES Waller Creek Communications, Incorporated (WCC) and submits the following comments in reply to comments filed by other parties regarding the Second Further Notice of Proposed Rulemaking (FNPRM) released by the Commission in the above-referenced matters.

Summary

WCC's initial comments focused on development of an analytical construct for identifying unbundled network elements (UNEs) in this proceeding. WCC suggests the Commission create a hierarchy of UNEs that makes the most critical, least readily replicable network elements the hardest to remove from the list of unbundled elements. WCC's initial comments called for three categories of UNES: (1) Raw Materials; (2) Enabling Functions; and (3) Business Enhancements. The core UNEs, the "Raw Materials," are those that provide the essential, technology independent facilities and functions that make broad-based competition feasible.[1] As noted in WCC's initial

[1] As examples of Raw Materials UNEs, WCC cited the following elements in its initial comments: copper (interoffice, loop, and sub-loop); fiber (interoffice, loop, and sub-loop); microwave or

comments, any standards employed by the Commission to identify UNEs should ensure the availability of "Raw Materials" network elements.

WCC provides brief reply comments in three areas. First, WCC notes the broad support for inclusion of Raw Materials UNEs at the core of any list of network elements, and responds to ILEC arguments to the contrary. Second, WCC explores the critical nature of the use of Raw Materials UNEs in the development of a wholesale market for other elements. Third, WCC refutes the ILECs' arguments against inclusion of a dark fiber UNE. Dark fiber availability is extremely important to the development of ubiquitous competitive alternatives nationwide, and the ILECs' claims about its availability from other sources are specious and misleading.

Reply Comments

I. Raw Materials must be at the core of any list of UNEs.

Across the board, the companies who are in the business of opening local exchange markets to competition support the inclusion of loops, sub-loops, dark fiber, distribution frames, and other raw materials as available UNEs. In spite of their different market entry strategies, the competitive interests that separate them, and the various market segments they represent, the participants in the competitive industry uniformly recognize the need to maintain the availability of cost-based raw materials. *See, e.g.*, Comments of the Association for Local Telecommunications Services (ALTS), the Competitive Telecommunications Association (CompTel), AT&T, Qwest, e.spire Communications, Inc. and Intermedia Communications Inc.

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wireless (where used by the ILEC for local transmission in rural areas); transmission equipment in the loop (e.g., digital loop carriers); distribution frames (MDF, DSX-1, DSX-3, Fiber); and power supply.

In addition, state regulators who have worked "in the trenches" on interconnection arbitration disputes since the *Local Competition First Report and Order* recognize the centrality of loops and other raw materials to the development of sustainable local exchange competition. *See, e.g.*, Comments of the Public Utility Commission of Texas (PUCT), Comments of the People of the State of California and the California Public Utilities Commission.

The Commission received the same message from large telecommunications users (*see* Comments of the Ad Hoc Telecommunications Users Group), and from advocates of residential consumers (*see* Comments of the Joint Consumer Advocates). The manufacturers and vendors of computers, consumer electronics, and computing and information services also recognized the importance of a broad availability of raw materials UNEs (*see* Comments of the Information Technology Industry Council). As the Information Technology Industry Council pointed out, "[e]ven if new entrants were able and willing to commit the needed resources to create an alternative public network, competition would be substantially delayed pending such construction. Worse yet, the new construction would needlessly duplicate an already underutilized network and exponentially increase the cost and risk of entry into the local services market."[2]

Even the ILECs hesitate to question the necessity of loop unbundling, but nevertheless plunge in with abandon. The ILECs uniformly (and predictably) dispute the necessity for any meaningful network unbundling. The ILECs claim that the presence of a single competitor in a small market area should call into question the availability of

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[2] Comments of Information Technology Industry Council, at 4.

even the most essential network elements. Even that standard, however, is not strict enough for the ILEC analysts. For example, in the impairment test presented on behalf of Ameritech, a network element could fail the impairment test based on the *hypothetical* market plan of a *potential* competitor.[3] The ILEC approach denies the necessity of unbundling even the most fundamental elements of the network. It would result in standards that confound the basic requirements of the terms of §§ 251(3) and 251(d)(2) of the Act. As discussed in the dark fiber context below, the ILECs repeatedly overstate the raw materials alternatives available to CLECs and understate the statutory unbundling requirements of the Act.

The fact that the ILECs are bent on preventing effective use of UNEs has been hammered home to WCC recently as it has attempted to turn up its networks. After fighting for and winning the right to use dark fiber to serve wholesale customers, and installing tens of millions of dollars worth of equipment in 22 central offices in Austin, Texas, WCC was informed that Southwestern Bell opposed its plans to cross-connect fiber and copper at the distribution frames inside Bell central offices.[4] Without the requisite cross-connects, of course, WCC's installed network capacity remains dark and useless. Based on its experience, WCC urges the Commission to adopt a raw materials UNE framework that explicitly includes a distribution frame UNE, as suggested in

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[3] "In the second step of our impair test, if there are no *actual* competitors providing the service, then we look to the business case of *potential* entrants. ... If it can be demonstrated that at least one potential competitor has a viable business case through self-supplying or purchasing the element, then the element should again be deemed to fail the impair test." Affidavit of Debra J. Aron and Robert G. Harris on Behalf of Ameritech, at 45. *See also* Affidavit of William L. Fitzsimmons on Behalf of Ameritech.

WCC's initial comments. If the Commission chooses not to provide full access to the distribution frame as a UNE, then cross-connects should be identified as stand-alone UNEs. In this way, the availability of basic raw materials such as fiber or copper will not be frustrated by the ILEC's refusal to attach the raw materials to the network in a functioning fashion.

WCC notes that the ILECs rely heavily on Justice Breyer's concurring opinion in justifying their positions on UNEs. WCC also notes that Justice Breyer's logic is completely consistent with WCC's position that raw materials UNEs are at the heart of the Act's unbundling requirements. Justice Breyer's analogy to the sharing of railroad facilities makes the point that the obvious network elements are the "readily separable and administrable physical facilities," the "bridges, tunnels, or track" in the railroad system.[5] The raw materials UNE category suggested by WCC incorporates these physical facilities, the sharing of which Justice Breyer recognizes as being central to the Act's unbundling requirements. However Justice Breyer's reasoning is used, it clearly highlights the central position raw materials UNEs should play in the Commission's consideration of the Court's remand.

In addition, Justice Breyer argues that it is "in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[6] WCC

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[4] Southwestern Bell's approach to WCC's use of UNEs has been reminiscent of Churchill's approach to defending England in World War II. "We will fight you for the fiber, we will fight you at the frame, we will fight you for the cross-connect ....we will fight you!"

[5] *Iowa Utilities Board v. AT&T*, __ U.S. __, 119 S.Ct. 721, 753 (1999)(Breyer, concurring in part and dissenting in part).

[6] *Id.*, at 754.

agrees. When it uses technology independent raw materials UNEs, such as dark fiber, WCC adds its own advanced technology in the "unshared" portions of its enterprise, and in so doing provides new and competitive service offerings. Without access to shared raw materials, however, WCC cannot create competitive alternatives in the unshared portions of the network. Again, raw materials are the essential resources necessary for sustainable competition to develop. Any standards for UNEs developed in this proceeding should give raw materials a preferred position.[7]

II. A Viable UNE Wholesale Market Requires Availability of Raw Materials UNEs.

Several commenters suggest, and WCC agrees, that a functioning wholesale market for an element must be in place before the UNE is no longer available under the Act. Qwest summarizes the point as follows:

> The impairment test of Section 251(d)(2), which is written from the point of view of the requesting carrier, requires an inquiry into whether a *wholesale market* exists for a particular element. For a wholesale market to exist, two criteria must be met. First, the competitively supplied network element must be *interchangeable* with the ILEC network element... . Second, if the element is interchangeable, there must be a sufficient number of *wholesale providers* of the element to produce an effectively competitive market for the network element.

Comments of Qwest, at 3. *See also*, Comments of CompTel, Comments of NorthPoint Communications.

As WCC explained in its initial comments, we provide wholesale services to other carriers using a combination of WCC equipment and UNE dark fiber. WCC's service

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[7] Sprint suggests that the Commission establish a five year "quiet period," during which "it would look with disfavor on any waiver requests and would require the strongest possible showing before granting such relief." Sprint arguest that "[s]uch a quiet period is essential if the Commission expects CLECs to be able to use the UNE approach to local market entry." Comments of Sprint Corporation, at 41. WCC recommends that such a "quiet period" apply at a minimum to the raw materials category of UNEs. This approach would provide needed certainty in the market, and would recognize the primary importance of such UNEs to the development of ubiquitous local competition.

offerings will facilitate the development of a wholesale market for several network elements. WCC makes this possible by having established ubiquitous presence in the ILEC central offices in our market areas. WCC's network investments will give its carrier customers a choice for transport, and will allow for reduced reliance on ILEC switching, OSS, and other elements and interfaces. Over time, WCC plans to become the alternative to the ILECs in the markets it serves, and is positioned to provide a broad enough range of services to execute that plan.

WCC's ability to provide a wholesale alternative for many "enabling function" or "business enhancement" UNEs,[8] however, is dependent on our continued access to raw materials UNEs. Without the broad access to dark fiber and copper resources granted in WCC's interconnection agreement, WCC could not have constructed the ubiquitous citywide networks that make its wholesale strategy possible.[9] Without the availability of dark fiber, for example, the construction of ubiquitous interoffice transport would not have been viable. WCC (or AT&T for that matter) cannot reasonably commit the financial resources necessary to duplicate ILEC fiber facilities ubiquitously in a metropolitan area. Alternatives to those facilities are not available to WCC in the markets we serve (in spite of the fantasies concocted in the comments of several ILECs). By using the fiber raw materials in conjunction with our own technology, however, WCC

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[8] These categories of UNEs are described in WCC's initial comments.

[9] The Public Utility Commission of Texas (PUCT) recognizes the competitive importance of the raw materials UNE rights granted to WCC and others in the Texas interconnection arbitration proceedings. *See* Comments of PUCT (urging inclusion of dark fiber and sub-loop unbundling in list of national UNEs). The Texas Commission's actions have created the necessary conditions for broad-based wholesale competition, and WCC urges the Commission to act in accordance with the Texas Commission's comments. At the heart of the PUCT's actions has been the rights granted regarding raw materials UNEs.

is able to present a viable alternative to the ILEC everywhere it serves. The lesson is simple: if raw materials UNEs are not available, the prospects for moving other types of elements off the UNE list will be extremely dim.

III. The Commission should establish a Dark Fiber UNE.

The initial comments evidence strong support for including a dark fiber in the national list of UNEs that result from this proceeding. As WCC noted in its initial comments, the dark fiber UNE approved by the PUCT has created the opportunity for ubiquitous competitive alternatives utilizing advanced technologies that surpass the capabilities of the ILECs. The experience with dark fiber in Texas led the PUCT to recommend inclusion of dark fiber as a UNE in this proceeding, and, as the leading user of dark fiber in Texas, WCC strongly endorses the PUCT's recommendation.

The dark fiber UNE is not only endorsed by numerous commenters from across the industry spectrum. It has been approved by numerous states and federal courts since the issuance of the *Local Competition First Report and Order*. WCC is aware of the following jurisdictions in which dark fiber has been found, by either state commission or reviewing federal court, to constitute a UNE: Arizona, the District of Columbia, Georgia, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Tennessee, Texas, and Washington.

The regulatory authorities in these jurisdictions have wisely rejected the very same ILEC arguments against the dark fiber UNE presented in this proceeding. The ILEC opposition is stated in three steps. Each step of the argument is wrong and should be dismissed by the Commission.

First, the ILECs argue that dark fiber does not qualify as a UNE because dark fiber is not "used to provide a telecommunications service." It is, according to the ILECs, merely "unused inventory."[10] This exact argument has been rejected by numerous commissions and federal courts. For example, Senior District Judge Britt of the federal court for the Eastern District of North Carolina, flatly rejected BellSouth's version of this argument, ruling that:

> [D]ark fiber is completely different from the rolls of copper and stacks of switches alluded to by BellSouth, because dark fiber is already in the ground. It is thus more a part of the network than it is inventory. In some cases, according to the parties' statements in oral argument, it is wound around "lit" fiber inside the same sheathing.

MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR, slip op. at 7. The North Carolina court went on to find that "[u]pon a review of a full record, dark fiber falls clearly within the definition of a network element." *Id.* at 9. Similar ILEC arguments were rejected by the federal district court in Oregon, which, after the Supreme Court's *Iowa Utilities Board* decision, re-affirmed its 1998 finding that dark fiber is a UNE.[11] Dark fiber was also found to be a network element by federal courts in post-*Iowa Utilities Board* cases in Arizona,[12] Kentucky,[13] and the District of

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[10] *See*, Comments of SBC Communications, Inc., at 53; Comments of GTE Service Corporation, at 80.

[11] *U.S. West v. AT&T*, 31 F. Supp.2d 854 (D. Oregon 1998); *U.S. West v. Oregon*, No. Civ. 97-1575-JE, slip op. at 13-14 (May 3, 1999).

[12] *U.S. West v. Jennings*, No. CV 97-26-PHX-RGS-OMP (D. Ariz. May 4, 1999).

[13] *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. Civ. A. 97-76 (E.D. Ky. March 11, 1999).

Columbia.[14] The Texas Commission's decision on dark fiber was upheld in a 1998 federal court decision.[15]

These decisions recognize that dark fiber is not "inventory," but is a vital part of the incumbents' networks that should be available to competitors. Dark fiber is incorporated in ILEC networks and is clearly used in the provision of telecommunications services. Dark fiber is no more "inventory" than is a loop to an unoccupied house. The fact that service does not currently traverse an installed facility does not make the facility disappear from the network. The ILEC argument that dark fiber does not qualify as a UNE should be dismissed in this proceeding as it has been by numerous federal courts that have considered the issue before and after the Supreme Court's remand.

The ILECs' second argument is that, even if dark fiber is a UNE, it does not meet the "impair" standard.[16] The ILECs' argument rests on the presumption that fiber is readily available to CLECs.[17] That presumption is wrong on two counts.

First, the availability of *fiber* in the marketplace does not meet the needs addressed by the dark fiber UNE. The statistics cited by the ILECs regarding availability of fiber apply almost exclusively to intercity and long haul fiber networks. As it stated in

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[14] *MCI Telecommunications Corp. v. Bell Atlantic*, No. Civ. 97-3076(TFH), 1999 WL 77380 (D.D.C. Feb. 17, 1999).

[15] *Southwestern Bell Telephone Company v. AT&T*, No. A97-CA-132-SS, 1998 WL 657717 (W.D. Tex. 1998).

[16] *See, e.g.*, GTE Comments at 82; SBC Comments at 54.

[17] SBC claims that "CLECs are in the same position as ILECs vis-à-vis dark fiber – it is commercially available to all carriers. Dark fiber has become a commodity that CLECs can purchase in a rapidly expanding wholesale market." SBC Comments at 54.

its initial comments, WCC could easily obtain intercity fiber between, for example, Austin and San Antonio from several competitive vendors. That has no relationship to the market for fiber between two ILEC central offices in either of those cities. As Qwest points out, the market has achieved "interchangeability" in the intercity fiber market, where wholesale providers of cost-based services are active. No such wholesale market has been established at the intracity level. Even where some fiber transport is available through downtown/business district fiber rings, WCC's experience is that (1) such facilities are not sufficient to connect a ubiquitous city network;[18] and (2) those "rings" never cover a full metropolitan area, and are never constructed to reach the full range of urban and suburban central offices.

On this point, WCC urges the Commission to examine the actual text of the *Forbes* article cited repeatedly by the ILECs (presumably for its catchy alliterative title), "Fiber Frenzy."[19] The "fiber" described in the article is part of intercity, long haul networks. The "frenzy" described involves companies' efforts to make profits off their long-haul networks. The "bandwidth market" described by *Forbes* simply does not reach into the interoffice, feeder and loop segments of ILEC networks where the dark fiber UNE opens up competition.

Second, to the extent fiber exists that is comparable to ILEC routes, it is usually not available to CLECs. As numerous commenters pointed out, the owners of fiber

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[18] Moreover, as Qwest also correctly notes, patchwork use of various carriers' facilities does not work as competitors build out their networks. "CLECs cannot realistically buy network elements on a patchwork basis from multiple carriers within a small geographic area, and have this kind of arrangement work on an operational basis." Qwest Comments, at 30.

[19] "Fiber Frenzy," *Forbes*, April 19, 1999, at 252.

capacity are not obligated to make it available to other carriers. WCC provided a real world example of this phenomenon in its initial comments: the largest non-ILEC fiber network in Austin, Texas belongs to the cable provider, who will not make excess capacity available to carriers such as WCC. Equally important in this regard is the fact that if the cable provider did reverse course and sell "dark fiber" to WCC, the duopolist's fiber resources would still only connect WCC to 23% of Southwestern Bell's central offices. Further, if WCC could not lease fiber from SWBT, the cable provider could extract monopoly profits for access to the small percentage of the market it would permit WCC to reach (again, assuming the cable provider changed its mind and leased fiber to WCC at all).

The Commission should carefully examine the ILECs' claims regarding impairment. The examination will reveal a great quantity of smoke, and several well-placed mirrors. The ILEC charts depicting fiber availability,[20] tout "route miles" owned by numerous providers. In nearly every instance, however, those miles are part of regional or nationwide fiber backbone networks. That fiber is simply not a substitute for the interoffice and loop fiber that makes up the dark fiber UNE.[21] Just as the ILECs have argued for years, contrary to the practical experience of nearly all people living in this country, that the U.S. local market is fiercely competitive, they now argue that dark fiber (and other elements) are widely and plentifully available to CLECs. Like their

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[20] *See* UNE Fact Report submitted by the United States Telephone Association, at III-27-28.

[21] If these fiber networks truly compete with ILEC intracity fiber routes, why would Qwest, a major fiber network builder, advocate the inclusion of a dark fiber UNE?

assertions about competition, the ILECs' claims on fiber availability are both deceptive and wrong.

The ILECs' third objection to a dark fiber UNE goes beyond the law, into the policy realm. The ILECs argue that even if the impair standard is met, that dark fiber should not be a UNE for two policy reasons. First, ILECs claim that a dark fiber UNE harms the ILECs' ability to serve as "carrier of last resort."[22] This argument assumes that there are no rational limits placed on the availability of dark fiber as a UNE. This has not been the case where states have instituted a dark fiber UNE. WCC urges the Commission to review the comments of the PUCT on this point. The Texas Commission includes requirements in its dark fiber UNE provisions that ensure ILECs are not left without necessary fiber resources, while at the same time protecting CLECs' rights to use the fiber. Reasonable limits on the availability of dark fiber ensure that CLECs and ILECs are treated fairly. The "carrier of last resort" concern is a simple scare tactic with no practical import.

Second, ILECs argue that a dark fiber UNE discourages new entrants from building their own networks, and gives ILECs no incentive to add additional fiber to their networks.[23] The opposite is true on both counts. First, WCC is proof that network building is encouraged by the availability of cost-based raw materials like dark fiber. WCC's $100 million investment in Texas networks would not have been feasible without the availability of dark fiber UNEs. As WCC grows, as is true for most competitors, it will build more and more of its own facilities. It will never, however, be in a position

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[22] GTE Comments, at 83-84.

that it makes economic sense to duplicate the ubiquitous fiber routes in the incumbent network. Without dark fiber, the incentive would have been to build nothing. With it, WCC has built advanced, flexible, technology-driven networks. Moreover, the dark fiber UNE will not discourage ILECs from making reasonable investments in fiber. The availability of the dark fiber UNE will shape ILEC investment decisions no differently than does the availability of any other UNE. ILECs investments will be driven by the market, and the market will include CLECs' rights to use network elements. In fact, the dark fiber UNE will generate revenue for ILEC network resources that otherwise would sit dormant. Implementation of the dark fiber UNE encourages efficient use of network resources, and maximizes social welfare. There is no evidence that the states that have implemented the dark fiber UNE have suffered from diminished ILEC or CLEC investment in facilities. The state that WCC is most familiar with has experienced a significant gain in network investment, and will soon experience a tremendous boost in competition, solely due to the productive use that WCC has made of the dark fiber UNE available in Texas.

As WCC argued in its initial comments, the dark fiber UNE is a critical raw material. The ILECs' arguments against the dark fiber UNE have no support in the Act or in the market, and they would result in bad policy. Rather, experience since the *Local Competition First Report and Order* demonstrates the dark fiber UNE should be included in any national list of network elements.

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[23] *See, e.g.*, SBC Comments, at 53-54.

Conclusion

Waller Creek Communications, Incorporated appreciates this opportunity to provide its reply comments. WCC again urges the Commission to adopt a framework for network elements that recognizes the primary importance of network "raw materials" to the development of sustainable, ubiquitous local competition. This approach will encourage investment in technological innovation by ensuring the availability of cost-based raw materials and the information and resources needed to utilize them.

Respectfully submitted,

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